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IN THE
Supreme Court of the United States

GEORGIA-PACIFIC CORPORATION
SALARIED EMPLOYEES RETIREMENT PLAN AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

JERRY L. LYONS, individually and on
behalf of all other persons similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During the past decade, numerous employers have adopted employee defined benefit plans under the Employee Retirement Income Security Act ("ERISA") commonly referred to as "cash balance" plans. These plans have become popular because they provide unique financial benefits to employees and employers. The important issue that has arisen under ERISA regarding these plans is how to calculate the amount to which an employee is entitled in the event he or she retires early. The court of appeals in this case rejected the straightforward approach adopted by the plan administrator of distributing precisely the amount then held in the plan for the benefit of that employee. The questions presented to this Court by that holding are:

1. Whether ERISA denies "cash balance" plans the freedom to pay a departing employee who elects to receive a "lump sum" benefit an amount equal to the employee's account balance as expressly provided by the plan, or whether it requires instead that the plan pay the employee an amount based on a "projecting forward/discounting backward" formula.

2. Whether the court of appeals' decision that favorable IRS determination letters and an IRS "safe harbor" provision relate only to "tax qualification" subjects plan sponsors to inconsistent obligations under ERISA and the parallel provisions of the Tax Code in violation of ERISA § 3002(c) (29 U.S.C. § 1202(c)) and Reorganization Plan No. 4 of 1978, 92 Stat. 3790.

3. Whether applying the IRS's "projecting forward/ discounting backward" formula to voluntary distributions under Petitioners' "cash balance" plan violates the fair notice doctrine.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Georgia-Pacific Corporation does not have a parent company. Two publicly traded funds, Longleaf Partners Fund and The Income Fund of America, Inc., own a beneficial interest of more than 10 percent of a class of Georgia-Pacific tracking stock (The Timber Group Company (NYSE: TGP)). See Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Georgia-Pacific Corporation Salaried Employees Retirement Plan and Georgia-Pacific Corporation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-37a) was entered on August 11, 2000, and is reported at 221 F.3d 1235 (11th Cir. 2000). The order denying the petition for rehearing and rehearing *en banc* (App. 54a) was entered on October 25, 2000, and is not reported. The opinion of the United States District Court for the Northern District of Georgia (App. 38a-

53a) was entered on March 22, 1999, and is reported at 66 F.Supp.2d 1328 (N.D.Ga. 1999).

JURISDICTION

The court of appeals entered its decision and judgment on August 11, 2000. Petitioners timely filed a petition for rehearing and a suggestion for rehearing *en banc* on September 1, 2000, and the Petition was denied on October 25, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The primary statute involved is § 203(e) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1053(e) (App. 55a-56a), and the primary regulations involved are Treas. Reg. §§ 1.411(a)-11 and 1.417(e)-1(d) (App. 56a and 56a-59a, respectively).[1]

INTRODUCTION

This case presents important federal questions involving a relatively new, and yet widely adopted, form of ERISA pension plan called a "cash balance" plan. Cash balance plans are employer-sponsored pension plans that establish bookkeeping accounts for each employee to reflect the value of the employee's retirement benefit. Since their introduction roughly 15 years ago, cash balance plans have been adopted by a large number of employers and consequently affect a significant number of employees.[2] The primary issue in this

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[1] IRC §§ 411 and 417 are parallel sections of the Tax Code to ERISA § 203(e). Section 3002 of ERISA provides that Treasury Regulations promulgated under IRC § 411 apply to ERISA § 203(e). 29 U.S.C. § 1202(c).

[2] For example, a February 2000 article cited in the Eleventh Circuit's opinion claims that cash balance plans have been adopted by more than

case is whether cash balance plans can be subjected to a phenomenon called "whipsaw" that requires plan sponsors to pay amounts far greater than the employees' stated account balances.

The decision of the Eleventh Circuit in this case, and that of the Second Circuit in a similar case, *Esden* v. *Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), expose employers who offer cash balance plans to substantial and unanticipated liability. Unless this Court reviews the holding below, Petitioners and similarly situated plan sponsors may be obligated to pay hundreds of millions of dollars more than expressly provided in the plans they sponsored – and departing employees will receive an unjustified windfall.

The court of appeals held that rather than paying an employee who opts for a lump sum benefit prior to retirement a benefit equal to his current account balance (the amount expected by the employee and funded by the employer), a cash balance plan must instead project the employee's retirement benefit *forward* to retirement age using the plan's interest crediting rate, and then discount the value of the benefit *back* to the present using a lower interest rate specified in a Treasury Department regulation.[3] As the district court observed, this "computational contrivance," which has the effect of paying employees a benefit for years in which they neither worked for the employer nor participated in the plan, "has only slight connection with economic reality" (App. 52a) and "do[es] not so much preserve benefit as [it] create[s] an economic windfall not intended by ERISA." *Id.* at 53a. This undermines settled

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300 employers and involve hundreds of billions of dollars in pension assets. *See* App. 3a n.2 (citing *Q-and-A: What You Need to Know About Today's "Cash-Balance" Plans*, Payroll Manager's Report, Feb. 2000, at 3).

[3] This is commonly referred to as "whipsaw" to capture the idea of jerking the calculation forward and then back.

expectations, contrary to the purposes of ERISA, and, more fundamentally, threatens the ability of employers and employees to design their own pension plan alternatives to meet the needs of a changing labor force.

The court of appeals also dismissed specific IRS determination letters that verified the Plan's compliance with the relevant provisions of law. This is not only improper and unfair, but it also gives rise to inconsistent standards of conduct for ERISA plan sponsors under the parallel provisions of ERISA and the Tax Code.

Finally, the court of appeals violated the fair notice doctrine by subjecting the Plan to whipsaw, even though the IRS first suggested this "requirement" only in a tentative, prospective notice, I.R.S. Notice 96-8, 1996-1 C.B. 359 (App. 60a–72a), issued three years *after* Respondent requested and received his lump sum distribution.

By any measure, Petitioners' distribution to Respondent conformed with a reasonable, good faith interpretation of existing law. Neither ERISA nor the Treasury Regulations require cash balance plans to apply a "project forward/discount backward" formula.

Guidance by this Court is necessary to clarify the freedom of employers to design cash balance plans with the flexibility and transparency desired by the modern work force, to maintain the parallel structure intended by Congress between the requirements of ERISA and the Tax Code, and to clarify that regulatory interpretations may not be imposed on private parties without providing fair notice of how the supposed obligations would apply to them.

STATEMENT OF THE CASE

Background

Historically, ERISA has recognized two kinds of pension plans: "defined benefit" plans, in which an employee

typically receives a lifelong annuity starting at retirement age, and "defined contribution" plans, in which employees have their own accounts that vary with investment performance (*e.g.*, a 401(k) plan). See 29 U.S.C. § 1002(34), (35). The ERISA pension plan at issue in this case is a hybrid form of defined benefit plan called a "cash balance" plan. These plans are called cash balance plans because a bookkeeping account is set up for each employee that expresses the accumulated value of contributions made by the employer on the employee's behalf and interest credits at a rate specified in the plan. Thus, the employee's retirement benefit is expressed as a single sum (*i.e.*, a "cash balance").

Under a traditional, defined benefit plan, the retirement benefit is expressed as an annuity starting at a specified retirement age, usually between 55 and 65. The value of that annuity is typically based on a formula tied to years of service and annual salary before retirement. If a traditional defined benefit plan allows employees leaving before retirement to take a lump sum benefit in lieu of an annuity (many plans do not), the present value of the employee's benefit cannot be calculated without using a mortality table and a discount rate.

With a cash balance plan, however, as with defined contribution plans such as 401(k) plans, there is no need to use mortality tables or discount rates to calculate present value. The present value of the benefit *is* the current account balance, which fully reflects all contributions to the account to-date, plus any investment returns and accumulated interest. Cash balance plans offer several advantages over more traditional plans. First, they are designed to meet the needs of a modern, increasingly mobile workforce because a greater proportion of benefits accumulate earlier in a worker's career and the benefits are more portable. See Senate Comm. on Fin., June 30, 1999 (statement of Patrick J. Purcell), *reprinted in* 1999 WL 20009611. For this reason, cash balance plans particularly benefit workers who change jobs throughout their careers and women, who are more likely to leave their jobs

for periods of time in mid-career. See Carol Quick, *Notes: An Overview of Cash Balance Plans* (Employee Benefit Research Institute) July 1999, at 7. Second, because the total assets of the Plan are pooled, the employer bears the investment risk, rather than the employees. Third, cash balance plans spread out pension costs over an employee's entire career, so that employers are not faced with rapidly escalating costs as workers approach retirement. *Id.*

The cash balance plan at issue in this case reflected these features. The Plan provided periodic pay credits to each employee's account equal to a stated percentage of the employee's pay. These amounts were further credited with an interest rate specified in the Plan until the accounts were distributed. The value of the plan accounts was periodically communicated to participating employees, including the Respondent.

Because cash balance plans combine elements of both traditional defined benefit plans and defined contribution plans, they do not fit well into the regulatory framework designed to govern more traditional plans. See Senate Comm. on Fin., *supra.* While they are "defined benefit" plans for purposes of ERISA, see ERISA § 3(35), 29 U.S.C. § 1002(35), many of the statutory and regulatory provisions designed for such plans are irrelevant to cash balance plans.

Statutory and Regulatory Provisions

The primary statutory provision at issue in this case, ERISA § 203(e), 29 U.S.C. § 1053(e), was added to ERISA as part of the Retirement Equity Act of 1984, Pub. L. No. 98-397, sec. 105(a), § 1053, 98 Stat. 1426, 1436. As part of the Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1139(c)(1), § 1053(e)(2), 100 Stat. 2085, 2487-88, Congress amended § 203(e)(2) so that § 203(e)(1)-(2) read as follows:

(e) Restrictions on mandatory distributions

(1) If the present value of any nonforfeitable benefit with respect to the participant in a plan exceeds $3,500, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.

(2)(A) *For purposes of paragraph (1) the present value shall be calculated* – (i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $25,000, and (ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $25,000 (as determined under clause (i)). In no event shall the present value determined under subclause (II) be less than $25,000.

(B) Applicable interest rate. – For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guarantee Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

(Emphasis added.)

In 1994, following the distribution to Respondent, ERISA § 203(e)(2) was amended again as part of the Retirement Protection Act. 29 U.S.C. § 1053(e)(2) (2000).

Two Treasury Regulations promulgated in 1988 are at issue in this case. The first, Treasury Regulation § 1.411(a)-11, interprets IRC § 411.[4] See 53 Fed. Reg. 31837, 31853 (Aug. 22, 1988). In 1993, when Respondent received his distribution, that regulation stated that IRC § 411(a)-11:

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[4] IRC §§ 411 and 417 are parallel sections of the Tax Code to ERISA § 203(e). *See* n.1, *supra.*

> [R]estricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specified valuation rules for determining the amount of the distribution. If the consent requirements or the valuation rules of the section are not satisfied, the plan fails to satisfy the requirements of section 411(a).

Treas. Reg. § 1.411(a)-11(a)(1) (1988).

Section 1.417(e)-1(d) (1988), in turn, applies the "valuation rules" specified in IRC § 417(e):

> For purposes of determining the present value of any accrued benefit and for purposes of determining the amount . . . of any distribution including a single sum, a defined benefit plan is subject to [specified interest rate limitations]. The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this paragraph.

Id. § 1.417(e)-1(d) (1988). Neither these regulations, nor their preambles, specifically address cash balance plans. See 53 Fed. Reg. 31837.

IRS Materials

In 1996, for the first time, the IRS expressed its tentative view that cash balance plans are required to project interest rates forward and discount them back to present value.[5] The agency also implied, for the first time, that cash balance plans might, in the future, be required to use standard interest crediting rates. See I.R.S. Notice 96-8 (App. 60a-72a).

The "Purpose" section of the Notice explains that "[t]he proposed guidance is being described in this notice in order *to permit advance public comment in anticipation of regulations*

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[5] Petitioners are not aware of any whipsaw claims asserted against cash balance plans prior to the issuance of Notice 96-8.

that incorporate the proposed guidance." App. 60a (emphasis added). The Notice states the IRS's belief that compliance with IRC §§ 411(a) and 417(e) requires cash balance plans to project the employee's account balance forward to normal retirement age and then discount it back to determine the present value of lump sum distributions. The Notice also contains a safe harbor provision:

> [F]or plan years beginning before the regulations are effective, a frontloaded interest credit plan would not be disqualified for failing to satisfy section 411(a) or 417(e) if the amount of the distribution satisfied those sections based on a reasonable, good-faith interpretation of the applicable provisions of the Code, taking into account preexisting guidance.

Id. at 71a. To date, the regulations contemplated by Notice 96-8 have not been promulgated, and the "proposed guidance" for cash balance plans – which was issued in 1996 merely "to permit advance public comment" – has never been finalized.

IRS determination letters are also crucial to this case. The IRS issues such letters to pension plans to approve the plans as "tax qualified" (and thus entitled to favorable tax treatment). Before the IRS will issue a determination letter, it must verify that the plan complies with clearly established Treasury Regulations, Treas. Reg. § 601.201(a)(3), including the interest rate limitations of IRC § 417(e) (which are the same as ERISA § 203(e)). See Worksheet Number 2A – Determination of Qualification (Department of the Treasury – Internal Revenue Service) 2000, at V.g. (App. 77a). In 1989, before Respondent received his distribution, the Plan requested and received a favorable determination letter. App. 86a-88a. In 1997, the Plan requested and received a second favorable determination letter. *Id.* at 89a-91a.

Case History

Respondent Jerry L. Lyons, a Plan participant, voluntarily retired from Georgia-Pacific on January 5, 1991. In November 1992, he opted to receive his benefit in the form of a lump sum payment under § 6.4(C). In January 1993, he was paid his current account balance, or $36,109.15. There is no dispute that the lump sum paid by the Plan was the amount properly credited to his account and the amount he expected to receive under the terms of the Plan.

Approximately three years later, in March 1996, Respondent asserted (through the National Center for Retirement Benefits)[6] that he was entitled to $49,341.83, or roughly $13,000 more than his account balance when he elected to receive a lump sum payment. Respondent claimed that Treasury Regulation § 1.417(e)-1 mandates that the amount of a lump sum payment be no less than the "present value" of his normal retirement benefit (an annuity starting at age 65) which would include interest credits projected forward until age 65. Consequently, he argued, the regulation entitled him to more than the $36,109.15 paid to him under the terms of the Plan.

In response, the administrator of the Plan determined that Respondent's lump sum distribution was proper, because the Plan did not provide for account balances to be projected forward and then discounted back. See App. 82a-85a. The administrator stated that cash balance plans are a special form of defined benefit plan that, consistent with IRS Notice 96-8, define benefits for each employee with reference to the employee's account balance. *Id.* at 83a.

On April 14, 1997, Respondent filed suit in the United States District Court for the Northern District of Georgia, individually, and on behalf of all others similarly situated.

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[6] The NCRB is a for-profit company that specializes in identifying alleged errors in pension benefit calculations.

Respondent claimed that the payment of a lump sum benefit equal to his account balance violated ERISA and various Treasury Regulations because the account balance was less than the "present value" of his retirement benefit.

The complaint alleged that Treasury Regulations §§ 1.411(a)-11 and 1.417(e)-1 required his account balance to be credited with interest to "Normal Retirement Age" (age 65) using the Plan's interest crediting rate for amounts left in the Plan, and then discounted to present value at a rate specified by the Pension Benefit Guaranty Corporation (the "PBGC rate"). Respondent claimed that, when projected to age 65, the difference between the higher interest crediting rate and the lower discount rate yielded a lump sum payout of $49,341.83, or approximately $13,000 more than his account balance.[7]

The parties stipulated to a class of all participants in the Plan who received a lump sum benefit that was lower than the "present value, if determined using the 'applicable interest rate'" as defined in the Internal Revenue Code and related regulations. App. 40a. The court also entered a consent order permitting the parties to submit cross motions for summary judgment on the threshold issue of liability before engaging in discovery and proceedings relating to the claims and/or defenses as to each class member. *Id.*

The district court granted summary judgment in favor of the Plan, holding that the Treasury Regulations §§ 1.411(a)-11 and 1.417(e)-1(d) exceeded the scope of ERISA § 203(e) and were therefore unenforceable. App. 51a-53a. Noting that

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[7] Although the parties agree that Respondent was entitled to $36,109.15 *under the terms of the Plan* (Respondent conceded as much in the Complaint, *see* Compl. ¶ 28), the parties dispute what lump sum Respondent should have received if the projection forward/discount back formula applied (*i.e.*, even if the projection forward/discount back formula applied, Petitioners dispute that Respondent would be entitled to $49,341.83).

Respondent freely elected to take the lump sum distribution, the district court explained that the higher benefit claimed under the Treasury Regulations arose only as a result of a "computational contrivance that has only slight connection with economic reality." *Id.* at 52a. The court concluded that the regulations "do not so much preserve benefit value as they create an economic windfall not intended by ERISA." *Id.* at 53a.

Respondent filed a timely appeal with the Eleventh Circuit. On August 11, 2000, that court reversed and remanded the case to the district court for further proceedings. App. 37a. Relying on *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the court concluded that ERISA § 203(e) and its legislative history were ambiguous (App. 18a-22a) and that Treasury Regulation § 1.411(a)-11 constituted a reasonable interpretation of that statute. *Id.* at 24a-26a.

The court rejected Petitioners' argument that the regulations were invalid and that, even if valid, they did not apply to cash balance plans. The court recognized that Notice 96-8 could not be determinative, because it was issued after Respondent requested and received his benefit (App. 28a), but nonetheless concluded that Petitioners had sufficient notice of the project forward/discount backward valuation requirement. *Id.* at 28a-30a.

The court also rejected Petitioners' contention that the favorable determination letter issued to the Plan in 1989 by the IRS protected the Plan from liability. The court concluded that the determination letter was "not owed any deference" because it did not specifically address the lump sum distribution methods used by the Plan. App. 33a. Consequently, "[t]he letter may protect the Plan from adverse tax treatment, but it does not protect the Plan from liability to its participants." *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

This case concerns the freedom of an employer to design a cash balance retirement plan with account values that are perfectly apparent to the participants at any given time. The ruling below interferes with this ability by requiring sponsors to apply a convoluted valuation rule to determine the amount that must be distributed to separating employees who choose to withdraw a lump sum payment, rather than simply paying out the employee's account balance.[8] Nothing in ERISA required this; the IRS twice approved Petitioners' plan without the convoluted formula; and the IRS never expressed the view that the convoluted valuation formula should apply to cash balance plans until three years after Petitioners paid out Respondent's account balance.

The widespread use of cash balance plans warrants review by this Court to ensure that such plans are not saddled with unpredictable costs that produce windfalls for a few former employees to the detriment of others who may lose the benefits of such plans in the future.

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[8] In that respect, the court of appeals' decision contradicts the well established principle that employers and employees are free to determine whether and what kind of pension benefits an employer will provide. *See, e.g., Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.").

I. ERISA PERMITS "CASH BALANCE" PLANS TO PAY A DEPARTING EMPLOYEE WHO REQUESTS A "LUMP SUM" BENEFIT AN AMOUNT DETERMINED BY THE PLAN'S EXPRESS TERMS RATHER THAN BY A "PROJECTING FORWARD/DISCOUNTING BACK" FORMULA.

A. The Plain Language Of The Statute Applies Only To Non-Consensual Distributions.

The plain language of ERISA does not require that the value of a lump sum benefit be projected forward and then discounted back. The discount rate provided by the statute to calculate present value applies only "[f]or purposes of paragraph (1)," – *i.e.*, for purposes of determining whether a lump sum distribution can be made "without the consent of the participant." See ERISA § 203(e), 29 U.S.C. § 1053(e).

Despite this expressly limited "purpose" for § 203(e), the Eleventh Circuit concluded that the language was ambiguous. The court then went on, under a *Chevron* step-two analysis, to conclude that the Treasury Regulations were a reasonable interpretation of the statute. App. 24a-26a.

The court thus ignored the crystal clear limiting words of the statute in favor of reconstructing and expanding the stated legislative purpose.[9] The court should not have deviated from the "venerable principle that if the language of the statute is clear, that language must be given effect – at least in the absence of a patent absurdity." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring). The "for purposes of" language of the statute is perfectly clear, and remarkably specific, even if other provisions are less clear.

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[9] The court of appeals conceded that the statutory terms did not apply to consensual distributions but turned nonetheless to legislative history to broaden the text: "Although the text and the heading of the provision enacted in 1984 dealt only with calculating amounts for purpose of the restriction on mandatory distributions, the Senate Report spoke in broader terms." App. 12a n.10.

See generally Edward A. Zelinsky, *The Cash Balance Controversy*, 19 Va. Tax Rev. 683, 751 (2000). Paragraph (2) of ERISA § 203(e) plainly provided that, with respect to *whatever* calculations are specified in paragraph (2), they apply *only* "[f]or purposes of [determining whether a lump sum distribution can be made "without consent of the participant"]." 29 U.S.C. § 1053(e)(2).

The court erred by not focusing, as *Chevron* requires, on the plain language of the statute. 467 U.S. at 842-43. Where the fundamental dictate of the statute is clear and specific, it is up to Congress, not an administrative agency, to amend the statute. While *Chevron* recognizes that agencies may act to fill interstices within statutes, the mere presence of inconsistent language does not authorize rewriting the unambiguous provisions of the statute. See *K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 318 (1988) ("The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications . . . .") (Scalia, J., concurring in part and dissenting in part). Thus, this Court should give effect to the specific and unambiguous limitation of § 203(e). See generally *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (applying the canon of statutory construction that "the specific governs the general").

Accordingly, the Treasury Department's decision to apply valuation requirements "whether or not the participant's consent is required," Treas. Reg. § 1.411(a)-11(d), conflicts with the plain language of § 203(e).

B. The Court Of Appeals Improperly Disregarded The Plan Administrator's Interpretation.

The court compounded its interpretation errors by blatantly disregarding the Plan administrator's own interpretation of the Plan on the precise question at issue here. The Plan administrator concluded that the Plan did not require additional interest credits to Respondent's account for periods after he withdrew his account balance from the Plan.

App. 84a. (In the Complaint, Respondent concedes that this interpretation of the Plan is correct. See Compl. ¶ 28.) Thus, the Eleventh Circuit's decision to import a projection forward requirement into the Plan (an issue not briefed before or decided by the district court) violates the principle established by this Court in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). *Firestone* instructs that an ERISA plan administrator's interpretation of the plan controls, absent abuse of discretion, if the plan delegates to the plan administrator the authority to interpret the plan. *Id.* at 111. The Plan contains precisely this kind of delegation, authorizing the administrator "to construe this Plan and resolve all equitable and other questions that arise under this Plan." Plan § 8.2 (App. 74a-75a).

C. A "Projection Forward" Requirement Cannot Be Inferred From The Law, The Regulations, Or The Plan.

Even if the Court were to look beyond the specific, limited "purposes" language of § 203(e), it is neither permissible nor reasonable for the court to interpret the statute or regulations to require cash balance plans to project interest credits forward to retirement age and then discount them back.

The court concluded that "Treasury Regulation § 1.411(a)-11(d) clearly provides that ERISA § 203(e), and the discount interest rates it prescribes, applies to consensual as well as non-consensual lump sum distributions" (App. 16a), but the court did not find that the law or regulations directly required the Plan to project interest credits forward. See *Id.* at 27a-32a. It is not until Notice 96-8, issued three years after the distribution to Respondent, that Treasury interpreted the statute or regulation to require cash balance plans to project interest credits forward. The court purports not to rely on Notice 96-8 (*id.* at 28a), but its analysis is unconvincing. The court merely says it was "skeptical about whether lack of guidance and direction can be a defense to this type of action by a plan participant, and in any event Treasury Regulation

§ 1.411(a)-11 when read against the Plan's own terms provides enough guidance that Georgia-Pacific is liable to plan participants even for distributions made before the issuance of IRS Notice 96-8." *Id.* at 29a-30a.

This is wrong on all counts. First, neither the statute nor the Regulation addresses anything other than discount rates, so they provide no basis whatever to infer a "projection forward" requirement. Without such a requirement there can be no discrepancy in interest rates, and thus no "whipsaw."

Second, even if § 203(e) were ambiguous, there is nothing in that section, or in Treasury Regulations §§ 1.411(a)-11 and 1.417(e)-1(d), that remotely requires a cash balance plan to project interest credits forward until retirement age.

Third, the Eleventh Circuit's passing observation that "the Plan itself" requires interest credits to be projected forward until age 65 (App. 32a) is completely untenable. The Plan unquestionably provides that employees may receive a "single lump sum payment" of the actual amount then credited to the employee's account. See Plan § 6.4(C) (*id.* at 74a) ("[A] participant . . . may elect to receive, in lieu of a standard form of benefit . . . a single lump sum payment equal to the amount credited to the Participant's Personal Account.")

Given this "lump sum" provision, the court's conclusion that Respondent "did not have a statutory right to the amount found in his hypothetical account prior to the normal retirement date" (*id.* at 31a) is inexplicable. The court looked right past the directly relevant provision of the Plan, and focused instead on the definitions of "normal retirement benefit," which is described in the Plan as an annuity starting at age 65, see Plan §§ 6.2, 6.3(a) (*id.* at 73a-74a) and "Accrued Benefit." Plan § 1.1 (*id.* at 73a). But neither of these provisions requires projecting forward. The court mistakenly relied on ERISA § 3(24), which merely states that the "accrued benefit" under a defined benefit plan is

"determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age. . . ." These definitions address the form of distribution at retirement age, but provide no hint of a "projecting-forward" requirement.[10] They provide no basis for the court's statement that "the Plan specifies that [Respondent's] hypothetical account balance must be projected forward using the interest credit rates set forth in the Plan." *Id.* at 32a. It does not. The court simply read too much into these provisions of the Plan, and read the "lump sum" provision completely out of the Plan.

In fact, it would have been ludicrous to design the Plan in a manner requiring it to pay interest credits after participants have chosen to withdraw their account. Indeed, under such a plan, the stated account balance would be meaningless and the retirement benefit would never be known to the employer or employees until after the whipsaw calculation. As the district court recognized, the "projecting forward" formula is no more than a "computational contrivance that has only slight connection with economic reality." App. 52a. In light of the Plan's directly applicable "lump sum" provision, this "computational contrivance" has no connection with the Plan either.

D. The "Projection Forward" Requirement Creates An Internal Conflict Within Treas. Reg. § 1.411(A)-11.

Treas. Reg. § 1.411(a)-11, which forms the principal basis for the Eleventh Circuit's decision, requires that participants give informed consent to retirement plan distributions exceeding the statutory threshold of $3,500 and goes on to

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[10] The Plan's definition of "Accrued Benefit" provides that a employee's plan account as of any given time can be expressed as a normal requirement annuity by dividing the account balance by the actuarial factors set forth in Appendix A of the Plan. *See* Plan § 1.1 (App. 73a).

state: "Furthermore, consent is not valid if a significant detriment is imposed under the plan on any participant who does not consent to a distribution." Treas. Reg. § 1.411(a)-11(c)(2)(i). Obviously, the Eleventh Circuit's holding that Respondent's "Accrued Benefit" under the Plan had to be whipsawed up to $49,314.83 if he took an immediate distribution, but was only $36,109.15 if he left it in the Plan, imposes a "significant detriment" on Respondent if he fails to consent to an immediate distribution. Indeed, he would lose the entire $13,000 difference (and more) if he declined to consent to an immediate distribution.[11] Thus, the Eleventh Circuit's holding conflicts with the regulation itself by forcing employees to take premature distributions from their retirement plans.

E. A "Projection Forward" Requirement Is Unreasonable For Cash Balance Plans.

The preceding discussion demonstrates that neither the law, the regulation, nor the Plan contains a "projection forward" requirement. Indeed, such a requirement is unreasonable in the context of a cash balance plan. Under a traditional defined benefit plan, it makes sense to calculate "present value" because the value of the benefit depends on how many years the employee will live to collect the fixed annuity. Calculating the *present* value of such a benefit requires an estimate of the employee's life span based on actuarial

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[11] The penalty for declining to consent to a distribution is even more severe when the age 65 (normal retirement) value of the benefit is considered. If Respondent had been paid $49,341.83 (as the Eleventh Circuit suggests), and had "rolled" the money into an individual retirement account and conservatively invested it earning the same return provided under the Plan, (PBGC "immediate" plus 75 basis points), he would have 27% more money 13 years later at age 65. For example, assuming an overall 6% rate of return under the Plan (which Respondent could easily match with conservative investments) he would have $105,242.58 at age 65 by taking an immediate distribution and only $77,018.22 if he refused to consent to an immediate distribution.

assumptions contained in a mortality table, and an interest rate to discount the value of the future payments back to when the lump sum benefit is paid.

By contrast, a cash balance plan requires *no* additional calculation to determine the present value of the employee's benefit at any given time. In cash balance plans, each employee's account balance reflects the "present value" of the employee's benefit (the total service credits and interest credits accumulated to date), so there is no need to use any "computational contrivance." App. 52a. Thus, there is no basis in law, regulation, or logic to require cash balance plans to project interest credits forward to age 65 and then discount them back to present value.

Applying the interpretation of ERISA § 203(e) and the regulations suggested by Respondent creates an irrational situation in which plan participants who elect to receive an early, lump sum benefit actually receive ***more than*** the "present value" of their retirement benefit. Stated differently, they receive the "present value" of their benefit (equal to the total pay and interest credits they have accumulated as of the distribution), *plus*, through the operation of whipsaw, a windfall that amounts to a payment of interest credits for years in which the plan participant neither works for the employer nor participates in the plan.[12] On the other hand, plan sponsors may suddenly face large and unexpected liabilities. Under Respondent's theory, Petitioners alone could be liable for millions of dollars in additional payments. See App. 7a, n.7. This is not consistent with ERISA's aspiration of uniformity and clarity in the administration of pension plans.

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[12] This permits participants effectively to earn a *double* interest, because the participant is able to withdraw the lump sum (including future interest credits) and then reinvest it elsewhere.

F. The IRS Specifically Approved Petitioners' Plan Including Its Interest Rate Limitations.

Faced with a statutory and regulatory scheme that did not address cash balance plans, Petitioners sought and obtained specific approval from the Treasury Department/IRS for the Plan's design. The IRS verified that the Plan complied with the applicable legal requirements. In cursory fashion, the Eleventh Circuit dismissed the 1989 favorable determination letter the Plan received from the IRS.[13] The court concluded the letter was "not owed any deference" (App. 33a) because such letters address only tax issues and "do not protect the Plan from liability to participants." *Id.* at 33a-34a. The Eleventh Circuit misconstrued the significance traditionally attached to IRS determination letters.

The IRS's own regulations establish the significance of the favorable determination letter provided to Petitioners. For example, Treas. Reg. § 601.201(a)(3), which was not addressed by the court below, provided as follows:

> A determination letter is issued only where a determination can be made on the basis of clearly established rules as set forth in the statute, Treasury decision, or regulation, or by a ruling, opinion, or court decision published in the Internal Revenue Bulletin.

Id.; see also ERISA § 3001(d), 29 U.S.C. § 1201(d) ("The Secretary of Labor shall accept the determination [letter issued to a plan applicant] of the Secretary of the Treasury as prima facie evidence of initial compliance by the plan with the standards of . . . this chapter [including ERISA § 203(e)]."). Moreover, the IRS checklists used to determine whether a plan is entitled to a favorable determination letter

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[13] The court rejected the 1997 determination letter in a footnote on the grounds that the determination was made after Respondent and those similarly situated with him had received their distributions. App. 34a n.30.

demonstrate the directly relevant, and conclusive, nature of the letter issued to the Plan. These checklists specifically require the agency to verify, *inter alia*, that the plan satisfies the IRC § 417 interest rate limitations, see Worksheet Number 2A – Determination of Qualification (Department of the Treasury – Internal Revenue Service) 2000, at V.g. (App. 77a), and that the plan's accrued benefit is "always ascertainable." *Id.* at VII.c.i. (App. 78a).

Thus, the fact that the IRS issued a favorable determination letter to the Plan confirms that the Plan's lump sum payment provisions either complied with, or were not governed by, the disputed regulations. The letter would not have been issued to Petitioners if the Plan failed to satisfy the IRC § 417/ERISA § 203(e) interest rate limitations invoked by the Respondent.

G. The Plan Also Qualified For The IRS "Safe Harbor."

The Plan also satisfied the terms of the safe harbor provision established by Notice 96-8. Under Notice 96-8, "for plan years beginning before the regulations are effective,"[14] a plan will "not be disqualified for failing to satisfy section 411(a) or 417(e) if the amount of the distribution satisfied those sections based on a reasonable, good faith interpretation of the applicable provisions of the Code, taking into account pre-existing guidance." App. 71a. For the reasons stated previously, and for the very lack of "pre-existing guidance," the Plan's decision to pay Respondent an amount equal to his account balance can be viewed as nothing less than a "reasonable, good faith interpretation" of existing law. Even so, the Eleventh Circuit summarily dismissed this safe harbor. See *id.* at 30a n.28.

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[14] As of January 2001, these regulations still have not been promulgated.

H. Forcing Plans To Reduce Interest Crediting Rates To Avoid Whipsaw Harms Participants.

The court of appeals suggested a bizarre solution to the legal and political havoc it wrought. To prevent former employees like Respondent from receiving pre-retirement windfalls, the court suggested plan sponsors need only "reduce any perceived disparity by reducing or eliminating the difference between the statutory discount rate . . . and the interest credit rate." App. 24a. In other words, employers should cut the rate of return to the detriment of all employees (and former employees who leave their account balances in the plan).

Given the widespread use and benefits of cash balance plans, the numerous defects in the court of appeals' analysis make review by this Court appropriate.

II. THE COURT OF APPEALS' SUMMARY DISMISSAL OF THE FAVORABLE IRS DETERMINATION LETTER ISSUED TO THE PLAN SUBJECTS EMPLOYERS TO INCONSISTENT LIABILITIES UNDER ERISA AND THE TAX CODE.

The Eleventh Circuit's decision also violates the statutory plan for ERISA by subjecting employers to inconsistent liabilities under ERISA and the parallel provision of the Internal Revenue Code, contrary to ERISA § 3002(c) (29 U.S.C. § 1202(c)) and Reorganization Plan No. 4 of 1978, 92 Stat. 3790. By relegating the favorable IRS determination letters issued to the Plan and Notice 96-8's "safe harbor" provisions (for which the Plan qualifies) only to tax qualification matters (App. 30a n.28, 34a & n.30.), the decision below opens up a chasm between tax and pension law that Congress did not intend.

Under the Eleventh Circuit's decision, a cash balance plan can be certified as "tax qualified" in IRS determination letters and be in complete compliance with the safe harbor

provisions of Notice 96-8, but still be held liable to plan participants for violating the identical provisions of Title I, Subtitle B, of ERISA, such as § 203(e). For example, Notice 96-8 allows cash balance plan sponsors to comply with ERISA § 203(e) and Treas. Reg. §§ 1.411(a)-11 and 1.417(e)-1(d) by using a "safe harbor" interest crediting rate equal to the prevailing three-month Treasury bill rate plus 175 basis points (1.75%). App. 70a. This "safe harbor" rate has exceeded the Code § 417(e) discount rate (30-year T-bills) in all but two months since July 1, 1996. See Federal Reserve Statistical Release H.15. This "spread" has exceeded 100 basis points (1.0%) in several months, which is greater than the "spread" in the Plan's interest crediting rate cited by the Eleventh Circuit as the basis for Respondent's whipsaw claim (0.75%). Thus, even plans that comply with the letter of Notice 96-8 *after* its issuance may be subject to "whipsaw" lawsuits under Title I of ERISA under the court of appeals' decision.

This dichotomy conflicts starkly with the congressional desire to ensure consistency in the administration of ERISA. ERISA establishes substantively identical requirements under Title I, Subtitle B, Part 2, 29 U.S.C. § 1132(a), which is administered by the Department of Labor, and Title II, Subtitle A, Part 1, 29 U.S.C. § 1053(e), which is administered by the IRS. In order to ensure that the rules were consistent, Congress provided in ERISA § 3002(c) and Reorganization Plan No. 4 that regulations provided by the Treasury Department/IRS would also apply to the standards established under Title I and administered by the Department of Labor. See ERISA § 3002(c), 29 U.S.C. § 1202(c) ("Regulations prescribed by the Secretary of Treasury under [the] . . . minimum vesting standards . . . shall also apply to the . . . [minimum vesting] standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter."); Reorganization Plan No. 4 of 1978, § 104, 92 Stat. at 3791 (in pursuing civil actions to enforce "Parts 2 and 3 of Subtitle B of Title I of

ERISA . . . the Secretary of Labor shall be bound by the regulations, rulings, opinions, variances, and waivers issued by the Secretary of Treasury").[15] Review of the court of appeals decision is necessary to restore the congruence between ERISA and the Tax Code as specified by Congress.

III. PETITIONERS DID NOT RECEIVE FAIR NOTICE OF A PURPORTED IRS REQUIREMENT THAT "CASH BALANCE" PLANS APPLY A "PROJECTING FORWARD/DISCOUNTING BACK" FORMULA.

The Eleventh Circuit's decision to construe Treasury regulations as imposing a project forward/discount back requirement on the Plan violates the "fair notice" doctrine. Petitioners had no reason to believe, when they provided a lump sum distribution to Respondent, that they were required to pay Respondent an additional $13,000 in interest credits for years *after* his withdrawal from the Plan.

The Eleventh Circuit rejected Petitioners' contention that they did not have sufficient notice of the purported regulatory scheme. See App. 29a-30a. In so doing, the court failed to address adequately a fundamental principle of due process: in enforcing an agency's interpretation of law, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for

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[15] The court of appeals itself cited the rationale for this parallelism: "'The reason that many ERISA sections have such counterparts is that, to encourage employers to establish pension plans, Congress provides favorable tax treatment for plans which comply with ERISA.'" App. 14a n.13 (quoting *Gillis* v. *Hoechst Celanese Corp.* 4 F.3d 1137, 1144 n.6 (3d Cir. 1993)); *see also Rybarszyk* v. *TRW, Inc.*, No. 97-4167, 2000 WL 1862664, at *10 (6th Cir. Dec. 21, 2000) ("ERISA provides that regulations promulgated by the Treasury Department pursuant to I.R.C. §§ 410(a), 411, and 412 are deemed applicable to the parallel provisions of ERISA. 29 U.S.C. § 1202(c)."); *McDaniel* v. *Chevron Corp.*, 203 F.3d 1099, 1115 (9th Cir. 2000) ("[R]ules prescribed under § 411 of the I.R.C. apply with equal force to § 204 of ERISA.").

violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co.* v. *FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).[16]

The standards for evaluating whether a party has fair notice of an agency interpretation have been developed primarily in a line of D.C. Circuit cases. In an action where, as here, there is no specific, pre-enforcement warning, the following standard applies:

> [W]e must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects the party to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

General Elec. Co. v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); see also *Trinity Broad., Inc.* v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *PDM Produce Brokerage Corp.* v. *USDA*, Civ. No. 00-1163 (D.C. Cir. Dec. 19, 2000) (applying the same standards).

In this case, a regulated party acting in good faith prior to Notice 96-8 would not have been able to identify with "ascertainable certainty" that the regulations relied upon by

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[16] Regardless of who is imposing the penalty (an agency or, as here, a court at the invitation of a private party), principles of fair notice require adequate notice of an agency's interpretation of a particular rule. *See generally, United States* v. *Chrysler Corp.*, 158 F.3d 1350, 1357 (D.C. Cir. 1998) (reversing an automobile recall ordered by the district court where the automobile manufacturer did not receive fair notice of the interpretation of an NHTSA safety standard); *Diamond Roofing Co.* v. *OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("An employer . . . is entitled to fair notice in dealing with his government.").

Respondent required the Plan to project interest rates forward and then discount them back. As explained in Part I, *supra*, neither the language of the regulations nor the statutory provision (§ 403(e)) is clear on this issue. Moreover, any such calculation would not logically apply in any event, because the "present value" of the benefit is already expressed as the employee's account balance. Cf. *United States* v. *Chrysler Corp.*, 158 F.3d 1350, 1357 (D.C. Cir. 1998) ("Chrysler might have satisfied NHTSA with the exercise of extraordinary intuition or with the aid of a psychic, but these possibilities are more than the law requires.").

There cannot be any real dispute that the plan administrator acted in good faith when he informed Respondent that the regulations did not apply because cash balance plans were a "special form" of plan. App. 83a. To the extent that there were any other "public statements" prior to 1996, they support Petitioners' interpretation of the regulations. First, in 1989, the Plan received a determination letter that it was tax qualified, a certification that cannot be made without the IRS verifying that the lump sum benefit calculations used by the Plan complied with the regulations. *Id.* at 86a.

Second, Notice 96-8 provides compelling evidence that the agency itself recognized that the regulatory structure, as it applied to cash balance plans, was anything but clear. The Notice recognized a lack of prior guidance and provided a safe harbor provision, an unnecessary measure if the regulations alone provided adequate notice. Furthermore, the Notice expressly stated that it provided only "proposed guidance . . . in anticipation of regulations that incorporate the proposed guidance." App. 60a. Tellingly, these regulations still have not been promulgated.

The agency's implicit concession that the regulations were unclear is particularly important in determining whether the regulated entity received fair notice. Thus, in *Trinity Broadcasting*, the D.C. Circuit placed considerable weight on

the fact that the FCC in previous proceedings had determined that similar rules were sufficiently unclear as to be unenforceable. See 211 F.3d at 631; see also *General Elec.*, 53 F.3d at 1333-34 ("Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished."). The same reasoning applies here: it would be manifestly unjust for the agency to conclude, on the one hand, that the regulations were unclear prior to 1996 and then request, on the other, that the regulations be enforced against Petitioners for all distributions occurring prior to 1996. See generally *Chrysler Corp.*, 158 F.3d at 1356 ("an agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation"). This conflict provides an independent and reinforcing justification for the Court's review of the decision of the court of appeals in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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